Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ABLE BUILDING MAINTENANCE CO., PETITIONERS

v.

BOARD OF TRUSTEES OF GENERAL EMPLOYEES TRUST FUND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an employer who is bound to a Trust Indenture governed by the Employee Retirement and Income Security Act 29 U.S.C. §1132 and the Labor Management Relations Act 29 U.S.C. §185 which contains an specific arbitration clause waive it's right to contest arbitrability by objecting to arbitration and refusing to arbitrate the matter?

2. Is the question of arbitrability a decision for the court and not the arbitrator, if one party to the contract objects to the arbitration on arbitrability grounds and refuses to participate in the arbitration?

3. Does a party's failure to appear at an arbitration hearing for whatever reason, constitute a waiver of the right to assert that it was not obligated to arbitrate in the first instance?

RULE 29.6

Petitioner Able Building Maintenance Company is a privately held corporation. Able Building Maintenance Company's parent corporation is Crown Building Maintenance, which is also a privately held corporation. No publicly held corporation owns 10% or more of Petitioner.

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The opinion of the United States Court of Appeals for the Ninth Circuit is dated March 31, 2006 and is an unpublished decision.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The Ninth Circuit's opinion was rendered on March 31, 2006. A Petition for Rehearing was filed on April 19, 2006. The Ninth Circuit denied the Petition for Rehearing by order dated May 9, 2006. Judgment was entered by the Ninth Circuit on June 8, 2006.

RELEVANT PROVISIONS

Title 29 United States Code, Section 185(a).

Suits by and against labor organizations.

(a) Venue, amount, and citizenship

Suits for violation of contract between and employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT

1. On January 13, 2003, Petitioner Able Building Maintenance filed a Complaint in the United States District Court, Northern District of California, seeking to enjoin an arbitration proceeding instituted by Respondents Board of Trustees of General Employees Trust Fund and General Employees Trust Fund allegedly pursuant to a provision in a Trust Indenture entered into by virtue of a collective bargaining agreement. The arbitration hearing proceeded on January 22, 2003, over petitioner's objection. The Complaint was ultimately dismissed by the district court. The dismissal was without prejudice to Petitioner to file a complaint to vacate the arbitration award.

The arbitration award was issued pursuant to an arbitration hearing purportedly convened pursuant to Section 7.13 of the Trust Indenture which provides, in pertinent part that "[t]he trustees, in their sole discretion and pursuant to procedures established by them, may refer any claim against an employer for delinquent contributions to final and binding expedited arbitration."

Over the strenuous and continuing objection of petitioner, which included the filing of the Complaint to enjoin the arbitration, respondent instituted and proceeded with arbitration pursuant to the above provision in an effort to seek to recover just over $661,000 for damages caused by improper contributions, i.e. contributions made by petitioner, and accepted by respondent, for non-bargaining unit employees. Petitioner contended that it was not

subject to the expedited arbitration provision for claims arising out of improper contributions. Respondent never filed an action to compel arbitration pursuant to this, or any other, provision of the Trust Indenture.

Thereafter, on June 23, 2003, petitioner filed a Complaint to vacate the Arbitration award, along with other causes of action. The district court dismissed all but the first cause of action for breach of contract, and construed it as a petition to vacate the arbitration award. Respondents filed a cross-motion to confirm the arbitration award.

2. On May 6, 2004, the district court issued its' decision on the cross-petitions to vacate/confirm the arbitration award. In a written decision, Hon. Charles R. Breyer held, *inter alia*, that (1) the court was to decide the issue of arbitrability of the claim as petitioner had not waived its right to raise the issue of arbitrability; and (2) the arbitrator exceeded her jurisdiction by awarding damages for improper contributions as they were not subject to the arbitration provision. Judge Breyer therefore vacated that part of the arbitration award which included damages incurred as a result of improper contributions. App. 14a – 22a.

3. Respondent appealed the district court's ruling to the Ninth Circuit Court of Appeals. The issue on appeal was whether claims arising out of improper contributions were subject to the expedited arbitration provision of the Trust Indenture, which called for expedited arbitration for delinquent contributions. The Ninth Circuit agreed with the district court that claims for improper contributions were not subject to the

expedited arbitration provision of the Trust Indenture, however reversed the district court on the ground that by not appearing at the arbitration hearing to register its' objections to arbitrability, Petitioner waived its' right to contest arbitrability. This issue was neither briefed to the Ninth Circuit, nor argued during oral argument before the panel.

In so ruling, the Ninth Circuit held that "a party with notice and an opportunity to appear must raise before the arbitrator any procedural objections, including those relating to the arbitrator's jurisdiction over a particular claim, in order to preserve those objections for judicial review." App. 3a.

The Ninth Circuit's decision was entered on March 31, 2006. Petitioners filed a Petition for Rehearing on April 19, 2006. App. 28a. The Petition for Rehearing was denied, without comment, by the Ninth Circuit on May 9, 2006. App. 27a.

REASONS FOR GRANTING THE PETITION

This case falls within the parameters of Supreme Court Rules 10(a) and 10(c) in that the Ninth Circuit's decision in this case presents an important question of Federal law concerning whether a party waives his or her right to contest arbitrability by refusing to arbitrate a case on arbitrability grounds. It is important for this Court to provide a definitive ruling on this issue because the Ninth Circuit's ruling is in direct conflict and wholly disregards established precedent issued by not only this Court, but followed by other Circuits, as well as the Ninth Circuit. In that the Ninth Circuit agreed with the district court that

claims for improper contributions were *not* subject to the expedited arbitration provision of the Trust Indenture, the issue before this Court is whether the Ninth Circuit properly held that Petitioner's refusal to participate in the arbitration proceeding, which refusal was due directly to its contention that the arbitrator had no jurisdiction over claims for improper contributions, constituted a waiver of Petitioner's right to contest arbitrability.

I. REVIEW IS WARRANTED BECAUSE THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW

A. *The Issue Decided By The Ninth Circuit Is An Important Question Of Federal Law That Should Be Directly Settled By This Court*

The Ninth Circuit's ruling and reasoning conflicts with the rulings of this court in a long line of labor cases, including but not limited to the *Steelworkers Trilogy* (*Steelworkers v. American Mfg. Co.*, 363 U.S. 564; *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574; and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)) and *AT&T Technologies v. Communcations Workers*, 475 U.S. 643 (1986), as well as the holding in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). This long line of cases, which have been cited routinely by Circuit courts, holds that a party cannot be compelled to submit to arbitration a dispute which he has not agreed to submit and that questions concerning the arbitrability of a dispute are for the court to decide. This latter point assumes that the parties have not agreed to submit the

question of arbitrability to the arbitrator. In this case, petitioner clearly objected to the arbitrator deciding the issue of arbitrability of the claim for improper contributions.

The Ninth Circuit has previously relied on this long line of cases to hold that failure or refusal to appear at an arbitration hearing does not waive a party's right to contest arbitrability, since a party cannot be compelled to arbitrate a claim that he has not agreed to so arbitrate. Refusal to participate is one method that a party can use to preserve its' right to contest arbitrability. *See Section C.2, infra.*

This Court has held consistently since the *Steelworkers Trilogy* cases that a party who has not agreed to arbitrate a dispute cannot be compelled to do so. *See also, AT&T Technologies, supra,* at p. 649; *Atkinson v. Sinclair Refining, Co., supra,* at p. 241 ; *First Options, supra,* at p. 943.

This Court has not squarely decided the issue, however, of whether, utilizing the well settled principles of arbitrability, a party waives his or her right to obtain a judicial declaration of arbitrability by refusing to appear at the arbitration hearing. As evidenced by the decision in *George Day Construction Co. v. United Brotherhood of Carpenters and Joiners,* 722 F.2d 1471 (9th Cir. 1984), a party potentially runs the risk of being found to have consented to the arbitrator deciding the issue of arbitrability simply by appearing for the hearing. To be sure, in the instant case, the expedited arbitration proceeding conducted by Respondent was conducted with no briefs, no reporters and no other means by which objections could

be independently recorded. The potential for misinterpretation of a parties' motive in attending a hearing, therefore, could be catastrophic.

Conversely, *George Day* and significant other cases also teaches that a party may "refuse" to arbitrate a case to preserve the question of arbitrability. However, if, as here, a party refusing to participate so as to not leave any question as to its intent, also potentially runs the risk of having the court rule as the Ninth Circuit did in this case. Despite reliance on cases like *George Day*, *supra*, and other authority, referenced below, the party contesting arbitrability is placed in a 'no win' situation. Given that the issue involves important questions of Federal law, this Court should definitively rule on the waiver issue raised by the Ninth Circuit.

B. *Public Policy Concerns Mandate Review*

The practical effect of the Ninth Circuit's ruling in this case is to (1) ignore well established Federal precedent concerning the arbitration of Federal labor disputes; and (2) leave employers or other parties to collective bargaining agreements and/or trust indentures, without a definitive guideline as to how to preserve the question of arbitrability. While it is recognized that arbitration of labor disputes is the preferred method of resolution, *AT&T Technologies*, *supra*, at p. 648, a party cannot be required to submit to arbitration claims which it did not so agree. The question of "how" to preserve this question for judicial review, is a matter of significant public policy to ensure that all parties to an arbitration agreement are getting what they bargained for.

Petitioner submits that the principles set forth by this Court, and other Circuit courts [including the Ninth Circuit] support the specific conclusion that a party contesting arbitrability may refuse to arbitrate a case and not be subject to a waiver argument. However, given the Ninth Circuit's decision in this case, petitioner's reliance on other well established authority resulted in significant prejudice to petitioner. A definitive statement of the law on this issue is mandated by the facts of this case and the important labor issues involved.

C. *Federal, Not State Law Is Controlling On The Interpretation Of The Trust Indenture And On The Question Of Arbitrability*

Respondent is a trust fund organized pursuant to the provisions of 29 U.S.C. §186 for the purpose of administering an employee benefit plan governed by the Employee Retirement and Income Security Act, 29 U.S.C. §1001. As such, the actions and relationships of the parties are governed by Federal law. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962). A suit under Section 301 of the Labor Management Relations Act is governed by Federal law. *Atkinson, supra*, at p. 246. "The Congress...has by §301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).

In reversing the district court's ruling, the Ninth Circuit, rather than relying on Federal law, relied on California state law in holding that

> "when an arbitration is conducted pursuant to a self-executing arbitration clause, as occurred here [fn], a party with notice and opportunity to appear must raise before the arbitrator any procedural objections, including those relating to the arbitrator's jurisdiction over a particular claim, in order to preserve those questions for judicial review. Otherwise the objections are waived."

App. 3a.

In so holding, the Ninth Circuit relied on a California appellate decision, *Nat'l. Marble Co. v. Bricklayers & Allied Craftsmen*, 184 Cal.App. 3d 1057, 1063-64 (9th Cir. 1981).

In *Nat'l Marble*, the California Court of Appeal addressed, *inter alia*, the issue of a petition to vacate an arbitration award *pursuant to California state law.* The holding did not cite to, or rely upon Federal law as it pertains to labor-management agreements. The Ninth Circuit's reliance on *Nat'l. Marble*, therefore, was improper as the issue in the case at bar is clearly an important issue of Federal, as opposed to state, law.

The Ninth Circuit also cited to *United Steelworkers of Am. v. Smoke-Craft, Inc.*, 652 F.2d 1356, 1360 (9th Cir. 1981) for the proposition that an objecting party has "an affirmative obligation to

present to the arbitrator any arguments why the arbitration should not proceed..."

Petitioner submits that the facts of the *Smoke Craft* case are significantly distinguishable from the facts of the instant case. In *Smoke Craft*, the objection to the arbitrator's award had nothing to do with the issue of arbitrability. It had to do with the arbitrator's consideration of material facts submitted as part of the arbitration.

Here, the central issue is whether the arbitrator had any authority to hear the matter in the first instance. There is no federal law cited by the Ninth Circuit that supports its decision. To the contrary, Federal law governing this issue is decidedly contrary to the Ninth Circuit's holding.

D. *Federal Precedent Establishes That Refusal To Arbitrate Does Not Waive The Right To Contest Arbitrability*

The issue of arbitrability was first squarely addressed by this Court in the *Steelworkers Trilogy* ((*Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)). The fundamental principles developed by this Court in those cases, which are applicable to the instant case are (1) a party cannot be required to arbitrate a dispute which it has not agreed to arbitrate; and (2) "[u]nless the parties *clearly and unmistakably* provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the

arbitrator." *Warrior & Gulf, supra*, at pp. 582 – 583 [emphasis added].

2. *The Decision Conflicts With Other Decisions Within The Ninth Circuit*

Building on the *Steelworkers Trilogy* cases, and their progeny, various Circuit Courts of Appeal, including the Ninth Circuit, have dealt with the issue of how a party contesting arbitrability may preserve their right for judicial review of same. In *George Day Construction Co. v. United Brotherhood of Carpenters and Joiners*, 722 F.2d 1471 (9th Cir. 1984), the Ninth Circuit held that the employer, who had objected to arbitrability of a claim, yet proceeded to attend the hearing and contest the matter on its' merits, had impliedly consented to allow the arbitrator to determine the issue of arbitrability. In so ruling, the court declared that "[a]n employer who objects to arbitration on jurisdictional grounds *may refuse to arbitrate the case.* The union is then put to the task of petitioning the court to compel arbitration...In such cases, the question of substantive arbitrability comes before the court in the first instance." *Id.*, at p. 1476 [emphasis added].

The Ninth Circuit again held in *Carpenters 46 N. Ca. Cos. Conf. v. Zcon Bldrs.*, 96 F3d 410 (9th Cir. 1996) that refusal or failure to participate in an arbitration hearing does not waive a party's right to contest arbitrability. In *Carpenters 46*, an arbitration award was entered against Sharon Hill, which, although not a signatory to the collective bargaining agreement, was alleged to be an alter ego of Zcon Builders, which was signatory. Initially holding that Sharon Hill [who failed

to attend the hearing] had constructive notice of the hearing, and opportunity to attend, the Ninth Circuit went on to hold that Sharon Hill's failure to appear did not waive its' right to contest arbitrability.

In so holding, the Ninth Circuit, relying on the *Steelworkers Trilogy*, and its progeny, stated "[t]he effect of these principles in this case is clear: Sharon Hill can only be required to submit to arbitration if it is bound by the terms of the Agreement which contain the arbitration procedure." *Carpenters 46, supra*, at p. 414. Since Sharon Hill did not manifest any assent to allow the arbitrator to determine arbitrability, the question was preserved for the court.

Significantly, the Ninth Circuit stated:

> "Our conclusion is not undermined by the fact that Sharon Hill refused to participate in the hearing, not because the arbitrator lacked jurisdiction, but because of a mistaken belief that it had not received proper notice of the arbitration. Our only inquiry is whether Sharon Hill's actions 'evinced clearly' its consent to have the arbitrator resolve the alter ego question. *George Day*, 722 F.2d at 1475. *Its refusal to participate in the arbitration hearing, for whatever reason, cannot be said to manifest such consent.*"

Carpenters 46, supra, at p. 416 [fn 5].

In confirming the holding in *Carpenters 46*, the Ninth Circuit declared in *Pacesetter Const. v. Carpenters 46*, 116 F.3d 436, 440 (9th Cir. 1997) that:

> "Our decision, however, was based on the fact that the objecting corporation had never appeared at the arbitration, and consequently never evinced its intent to allow the arbitrator to decide arbitrability within the meaning of *George Day*."

The Ninth Circuit's decision in the present case, therefore is in direct conflict with the decisions within the Circuit.

2. The Decision of The Ninth Circuit Conflicts With Decisions Of Other Circuits On This Issue

In addition to a conflict within the Ninth Circuit, the decision in this case also directly conflicts with well established out-of-Circuit opinions on this issue. In *General Motors Corp. v. Pamela Equities Corp.*, 146 F.3d 242 (5th Cir. 1998), the Fifth Circuit applied the principles of *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) and *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986) that there must be "clear and unmistakable evidence" that the parties agreed to allow the arbitrator to decide the issue of arbitrability. *General Motors Corp., supra*, at 248 – 249.

Other circuits have relied upon, and come to the same conclusion as the Ninth Circuit in the *Carpenters 46* case: that refusal to participate in arbitration does not waive a party's right to contest arbitrability. *See United Indus. Workers v. Government of V.I.*, 987 F.2d 162 (3rd Cir. 1993; *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators Warehouse Indep.*

Truck Drivers Union, Local No. 1, 611 F.2d 580 (5th Cir. 1980).

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 04-16173

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ABLE BUILDING MAINTENANCE CO.,
Plaintiff-Appellee

v.

BOARD OF TRUSTEES OF GENERAL EMPLOYEES TRUST FUND,
Counter-claimant-Appellant;

BOARD OF TRUSTEES OF GENERAL EMPLOYEES TRUST FUND; et al.,
Defendants-Appellants

v.

ABLE BUILDING MAINTENANCE CO.,
Counter-defendant-Appellee,

and CHARLES GILCHRIST, an individual; et al.,
Defendants

February 14, 2006, Argued & Submitted, San Francisco, California

March 31, 2006, Filed

NOTICE: RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO

THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

JUDGES: Before: REINHARDT, PAEZ, and TALLMAN, Circuit Judges.

OPINION: MEMORANDUM *

The appellants, the General Employees Trust Fund and its Board of Trustees ("Trust Fund"), appeal a decision of the district court, vacating an arbitration award in part and confirming the award in part. We reverse in part and remand.

In vacating the arbitration award in part, the district court reasoned correctly that the arbitration permitted by the Trust Indenture, in Section 7.13, does not apply to the part of the dispute that relates to losses incurred by the Trust Fund as a result of "improper contributions" made by the appellee, Able Building Maintenance Company ("Able").[1] The district court was correct that Section 7.13 applies only to the other part of the dispute -- the part involving "delinquent claims." By not participating in the arbitration proceeding, however, Able waived any objection to the arbitrator's exercise of jurisdiction over both, rather than only one, of the two claims. Under California law, when an arbitration is conducted pursuant to a self-executing arbitration clause, as occurred here,[2] a party with notice and opportunity to appear must raise before the arbitrator any procedural objections, including those relating to the arbitrator's jurisdiction over a particular claim, in order to preserve those objections for judicial review. Otherwise, the objections are waived. *See* Nat'l Marble Co. v. Bricklayers & Allied Craftsmen, 184 Cal.

App. 3d 1057, 1063-64, 229 Cal. Rptr. 653 (1986); *cf.* United Steelworkers of Am. v. Smoke-Craft, Inc., 652 F.2d 1356, 1360 (9th Cir. 1981)(finding, in a challenge to an arbitration that proceeded under federal law, that a party cannot raise in a confirmation proceeding procedural objections to an arbitration that it had failed to raise before the arbitrator because an objecting party has "an affirmative obligation to present to the arbitrator any arguments why the arbitration should not proceed. Parties to arbitration proceedings cannot sit idle while an arbitration decision is rendered and then, if the decision is adverse, seek to attack the award collaterally on grounds not raised before the arbitrator."). Here, as the district court correctly found, Able was given proper notice of the arbitration and the opportunity to participate, but chose not to appear. By not appearing before the arbitrator to object to her exercise of jurisdiction over the part of the dispute relating to losses arising from the improper contributions, the appellee waived that objection.[3] Because Able waived that objection and because the delinquent contributions claim was properly arbitrated pursuant to Section 7.13, we reverse the district court's partial vacatur of the arbitration award and remand to the district court so that it may confirm the award in full and determine the costs and attorney's fees, if any, to be borne by the appellees.

REVERSED IN PART AND REMANDED.

Footnotes

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

n1 The Trust Indenture also contains a general arbitration clause, Section 6.6, which provides that "the trustees shall have the power to . . . arbitrate . . . any obligations, liability or claim involving this trust." We need not consider the effect of that provision here.

n2 "A 'self-executing' arbitration clause is one which permits and provides for arbitration under rules therein incorporated" without the need for a prior court order. Mitchum, Jones & Templeton, Inc. v. Chronis, 72 Cal. App. 3d 596, 601, 140 Cal. Rptr. 160 (1977); *see also* Nat'l Marble Co. v. Bricklayers & Allied Craftsmen, 184 Cal. App. 3d 1057, 1063, 229 Cal. Rptr. 653 (1986)(stating an agreement's "provisions are self-executing in . . . that they set forth, without the necessity of resort to extrinsic material, the procedure to be followed . . . in deciding contractual disputes"). Because the Trust Indenture sets forth the procedure for arbitrating claims relating to unpaid contributions, and a claim involving such contributions was referred to arbitration (albeit along with a claim on a different matter that was arbitrable but not covered by Section 7.13), the referral to arbitration was self-executing -- no court order was required to establish the procedure by which arbitration of the claim for unpaid contributions was to be conducted before it could commence.

n3 Our conclusion that Able waived its objection to the arbitrator's exercise of jurisdiction over the part of the dispute relating to losses arising from improper contributions is unaffected by its argument that the arbitration should not have taken place because it had filed a complaint to enjoin it. As the district court correctly explained, Able never made the arbitrator aware that it had filed the complaint, which it could

have done simply by appearing at the arbitration, of which it had proper notice, and giving the arbitrator a copy of the complaint. Instead, the appellee chose not to appear. In any event, Able offers no authority -- and we are aware of none -- for the proposition that the mere filing of a complaint precludes an arbitrator from proceeding with an arbitration. Accordingly, had Able made the arbitrator aware of the complaint and the arbitrator decided to nevertheless continue the arbitration, Able would have been required to participate in the proceedings and then raise its procedural objection before a court via a petition to vacate the award or by opposition to a petition to confirm. *See* Nat'l Marble Co., 184 Cal. App. 3d at 1063-64; *see also* A. & E. Plastik Pak Co. v. Monsanto Co., 396 F.2d 710, 714 n.4 (9th Cir. 1968)(noting that when a party seeks a court order enjoining an arbitration, the proper course of action is for it to participate in the arbitration until it actually obtains the injunction).

Filed 5/6/2004
No. C 03-03958 CRB
IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

ABLE BUILDING MAINTENANCE CO.,
Plaintiff,

v.

BOARD OF TRUSTEES OF GENERAL EMPLOYEES TRUST FUND, et al.,
Defendants.

MEMORANDUM AND ORDER

This lawsuit arises out of an arbitration between plaintiff Able Building Maintenance Company (hereafter "Able Maintenance") and defendants General Employees Trust Fund and Board of Trustees of the General Employees Trust Fund (collectively "the Trust Fund"). The Trust Fund removed the action to this Court on the ground that there is federal jurisdiction under the Labor Management Relations Act ("LMRA"). Now pending before the Court are the Trust Fund's motion to confirm the arbitration award and Able Maintenance's motion to vacate the award. After carefully considering the papers filed by the parties, including the supplemental memoranda, and having heard oral argument on two occasions, the Court CONFIRMS the arbitration award in part and VACATES the award in part.

BACKGROUND

A. The Two Audits

Able Maintenance and the Trust Fund are parties to an Indentured Trust Agreement. The Agreement gives the Trust Fund the right "to cause an audit of the records of any employer by an accountant of the trustees' own selection for the purpose of determining the accuracy and sufficiency of payments made by the employer to the trust fund." Indentured Trust Agreement § 7.7. Pursuant to this Agreement, the Trust Fund conducted two audits of Able Maintenance's books and records. The first audit, covering the period from May 1, 1995 through August 31, 1998, concluded that Able Maintenance owed $175,223.83 to the Trust Fund. The second audit, covering the period from September 1, 1998 through July 31, 2001, found an additional $494,190.13 due to the Trust Fund.

The amounts due from the audits fell into two categories. The first category included monies owed because the employees in question worked a sufficient number of hours to be eligible for coverage, but Able Maintenance failed to report them to the Trust Fund and failed to make contributions to the Trust Fund on their behalf ("unpaid contributions"). The second category covers amounts paid by the Trust Fund in claims on behalf of employees who were not eligible for coverage, but whom Able Maintenance improperly listed on its report forms and for whom it submitted contributions to the Trust Fund ("losses from improper contributions"). The Trust Fund demanded that Able Maintenance pay the Trust Fund for both categories. Able Maintenance refused.

B. The First Lawsuit

In January 2000, the Trust Fund filed an ERISA action against Able Engineering Services, Inc. ("Able Engineering"), among other defendants. General Employees Trust Fund v. Able Engineering Services, Inc., C-00-0162 CAL. Able Engineering is a company related to Able Maintenance. The Trust Fund sought damages arising from improper contributions Able Engineering made to the fund on behalf of ineligible employees. The court granted summary judgment in favor of Able Engineering in an unwritten order.

C. Able I

After the court dismissed the Trust Fund's federal lawsuit against Able Engineering, the Trust Fund initiated a similar action against Able Maintenance. Rather than filing in federal court, the Trust Fund initiated binding arbitration pursuant to the Indentured Trust Agreement. The Agreement provides that "[t]he trustees, in their sole discretion and pursuant to procedures established by them, may refer any claim against an employer for delinquent contributions to final and binding expedited arbitration" subject to certain requirements. Indentured Trust Agreement § 7.13 (emphasis added). Those requirements include that the arbitration shall be conducted in an expedited manner, with no transcripts and no briefs. Id. § 7.13(a).

After once continuing the arbitration at the request of Able Maintenance, the Trust Fund re-scheduled the arbitration for January 22, 2003 and sent out proper notice to Able Maintenance. On January 13, 2003, Able

Maintenance filed an action in federal court to enjoin the arbitration. Able Building Maintenance Co. v. Board of Trustees of General Employee Trust Fund, C 03-0193 CRB ("Able 1"). The complaint identified the Employment Retirement Income Security Act ("ERISA") and supplemental jurisdiction as the basis for subject matter jurisdiction.

The day before the arbitration, the Trust Fund received a fax from Able Maintenance requesting a postponement of the arbitration due to the filing of the complaint; however, the arbitrator did not receive notice of the federal action or the request for the postponement.

The arbitrator held the arbitration as scheduled and Able Maintenance did not attend. The arbitrator ordered Able Maintenance to pay the Trust Fund $743,033.75, plus certain additional costs and interest. On February 19, 2003, Able Maintenance received notice of the arbitration award and immediately amended its complaint to include the facts of the arbitration and a petition to vacate the arbitration award.

The Trust Fund filed a motion to dismiss Able I on the ground that the Court lacked subject matter jurisdiction. Plaintiff filed an opposition in which it reasserted its claims under ERISA and supplemental jurisdiction, and in addition made a brief reference to its claims arising under the LMRA. After hearing oral argument, the Court dismissed Able Maintenance's complaint for lack of subject matter jurisdiction under ERISA and supplemental jurisdiction. The order specifically noted that the dismissal was without

prejudice to Able Maintenance filing a complaint to vacate the arbitration award and that the Court was expressing no opinion as to whether it would have jurisdiction over such a complaint.

D. The Present Lawsuit: Able II

On June 20, 2003, Able Maintenance subsequently filed this action in state court based on the same facts as Able I, but with new causes of action. In the first cause of action, entitled "breach of contract," Able Maintenance alleges defendant breached the Indentured Trust Agreement. Able Maintenance alleges that defendant breached this agreement by successfully arbitrating the parties' dispute as to whether Able Maintenance had to reimburse the Trust Fund for benefits paid to Able Maintenance's ineligible employees. In particular, Able Maintenance contends that the arbitration agreement does not cover such disputes.

In the second cause of action Able Maintenance alleges defendant breached the implied covenant of good faith and fair dealing by successfully arbitrating their dispute after the district court had dismissed the Trust Fund's lawsuit against Able Engineering. The third cause of action, entitled "Declaratory and Injunctive Relief," sought a declaration that (1) the arbitration provision contained in the Indentured Trust Agreement was unconscionable and unenforceable, (2) the Indentured Trust Agreement did not permit defendant to recover from Able Maintenance benefits paid to non-covered employees for whom Able Maintenance paid premiums, and (3) the district court's dismissal of the action against Able Engineering

precluded the Trust Fund from recovering benefits from Able Maintenance. Able Maintenance also sought an injunction enjoining defendant from recovering the benefits paid to non-covered employees. The fourth and final cause of action was entitled "abuse of process." Able Maintenance contends that defendant "abused process" by proceeding with the arbitration despite an "unconscionable" binding arbitration provision and the district court's dismissal of the action against Able Engineering.

Upon the Trust Fund's motion the Court dismissed the second, third, and fourth causes of action, but refused to dismiss the first cause of action; instead, the Court construed the first cause of action as a petition to vacate the arbitration award.

The Trust Fund subsequently filed the pending motion to confirm the arbitration award. The Trust Fund contends that the statute of limitations has run under California Civil Procedure Code Section 1288 precluding Able Maintenance from challenging the award and, that in any event, the arbitrator's decision was not in conflict with the Indentured Trust Agreement, beyond the scope of the arbitrator's authority, counter to public policy, or procured by fraud and therefore must be confirmed.[1] Able Maintenance opposes the Trust Fund's motion and has filed a counter motion to vacate the arbitration award.

DISCUSSION

I. Statute of Limitations

The LMRA allows parties to file suit in federal court for violation of contracts between an employer and a labor organization representing employees. Because the LMRA does not have a statute of limitations, the Court must apply the most closely analogous statute of limitations under state law. See Sheet Metal Workers Int'l Ass'n, Local Union 150 v. Air Sys. Eng'g, Inc., 831 F.2d 1509, 1511 (9th Cir. 1987); see also DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 158-59 (1983) ("Congress intended that the courts apply the most closely analogous statute of limitations under state law"). In California, the analogous statute of limitations is California Civil Procedure Code section 1288. See San Diego County Dist. Council of Carpenters of the United Bhd. of Carpenters & Joinders of Am. v. G.L. Cory, 685 F.2d 1137, 1139 (9th Cir. 1982). The statute provides that "[a] petition to vacate an award or correct an award shall be served and filed not later than 100 days after the date of the service of a signed copy of the award on the petitioner." Cal. Civ. Pro. Code § 1288.

The Trust Fund argues the 100-day statute of limitation has run and therefore Able Maintenance cannot object to the arbitration award. The Court disagrees. On February 19, 2003, Able Maintenance received notice of the arbitration award. On March 3, 2003, Able Maintenance amended its original complaint to include a petition to vacate the arbitration award, tolling the statute of limitations. The Court dismissed the complaint without prejudice on June 2, 2003. Able then filed a breach of contract claim in state court on June 20, 2003. The Court subsequently construed this claim as a petition to vacate. Accordingly, the filing of the breach of contract claim in state court tolled the statute of limitations on June 20, 2003 .

In total, then, the statute of limitations has run 28 days. The statute of limitations ran between February 19, 2003 and March 3, 2003, or 11 days. It also ran from June 2, 2003 to June 20, 2003 for 18 days. This leaves 71 days remaining before the statute of limitations bars Able Maintenance's petition to vacate.

Moreover, evan assuming Able Maintenance's petition to vacate was untimely, its failure to file a timely petition would not bar it from challenging the arbitration award on arbitrability grounds in defense to the Trust Fund's motion to confirm. See Carpenters 46 Northern California Counties Conference Board v. Zcon Builders, 96 F.3d 410, 416 (9th Cir. 1996) (holding that employer's failure to petition to vacate did not bar it from challenging the arbitration award on jurisdictional grounds in subsequent enforcement proceedings).

II. Claim for Losses Arising from Improper Contributions

Able Maintenance argues that the Trust Fund's claim for damages arising from Able Maintenance's improper contributions to the Fund is not subject to the Indentured Trust Agreement's arbitration provision and therefore the arbitration award must be vacated. The Trust Fund responds that Able Maintenance consented to the arbitrator deciding the issue of arbitrability, an issue which she resolved in the Trust Funds' favor, and, in any event, the parties' dispute is arbitrable.

A. Consent to the arbitrator deciding arbitrability

"[T]he question of arbitrability-whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance--is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 649 (1986). "However, because an arbitrator's jurisdiction is rooted in the agreement of the parties, the parties may agree to submit even the question of arbitrability to the arbitrator for decision." George Day Constr. Co. v. United Brotherhood of Carpenters & Joiners, Local 354, 722 F.2d 1471, 1474-75 (9th Cir. 1984). "Consent to grant the arbitrator such authority may be implied from the conduct of the parties in the arbitration setting." Id. at 1475. For example, in George Day, the parties' submission of the merits of the dispute along with the question of jurisdiction to arbitration without reserving the question of arbitrability constituted an implied consent to allow the arbitrator to determine arbitrability. Id. ("where, as here, the objection is raised, the arbitrability issue is argued along with the merits, and the case is submitted to the arbitrator for decision, it becomes readily apparent that the parties have consented to allow the arbitrator to decide the entire controversy, including the question of arbitrability.").

The Trust Fund argues that Able Maintenance impliedly consented to the arbitrator deciding arbitrability because it defaulted under Section 7.13(a) of the Indentured Trust Agreement. The default provision empowers the arbitrator to enter a default award against an employer who fails to appear at an

arbitration without good cause. Indentured Trust Agreement § 7.13(a). This default provision does not transform Able Maintenance's nonparticipation in the arbitration into consent to have the arbitrator determine arbitrability. The Trust Fund does not cite any case in which a district court was stripped of jurisdiction to determine arbitrability because the opposing party did not appear at the arbitration and instead filed a lawsuit. This omission is unsurprising given that in Carpenters 46 Northern California Counties Conference Board, 96 F.3 d at 415-16, the Ninth Circuit held that an employer's refusal to participate in an arbitration is "clearly insufficient to establish assent to arbitration by conduct." see also id. at n.4 (stating that under George DU the only inquiry is whether the employer's actions "clearly evinced" its consent to have the arbitrator resolve the arbitrability issue and that a "refusal to participate in the arbitration hearing, for whatever reason, cannot be said to manifest such consent."). Unlike George Day, there is no evidence that Able impliedly consented to the arbitrator deciding arbitrability; to the contrary, it filed a lawsuit challenging the arbitrator's jurisdiction to decide the dispute. Because Able Maintenance did not consent to the arbitrator deciding arbitrability, the Court must decide the issue.

B. Arbitrability

"[T]here is a presumption of arbitrability in the sense that `[a]n order to arbitrate the particular grievance should not be denied unless it be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'"

Dennis L. Christiansen Gen. Bldg. Contractor, Inc. v. Gen. Bldg. Contractor, Inc., 952 F.2d 1073,1076-77 (9th Cir. 1991) (emphasis added) (quoting AT&T Technology, Inc., 475 U.S. at 650). The presumption of arbitrability "carries particular force where the arbitration clause is phrased in broad and general terms." Westinghouse Hanford, Co. v. Hanford Atomic Metal, 940 F.2d 513, 517 (9th Cir 1991). In deciding whether a claim is arbitrable "[i]t makes no difference that the court may think the claim of no merit." See Haig Berberian, Inc. v. Cannery Warehousemen, 535 F.2d 496, 499 (9th Cir. 1976).[2]

As is set forth above, Section 7.13 of the Indentured Trust Agreement provides: "[t]he trustees, in their sole discretion and pursuant to procedures established by them, may refer any claim against an employer for delinquent contributions to final and binding expedited arbitration." (emphasis added). This arbitration clause is not phrased in broad and general terms; rather, it limits the arbitration to a single dispute, namely, Trust Fund claims against an employer for delinquent contributions. The question, then, is whether a claim for losses arising from improper contributions is a claim for delinquent contributions.

The arbitration agreement does not define a claim for "delinquent contributions;" however, Section 8.8 of the Indentured Trust Agreement does. This Section, entitled "Employer Liability," provides that the Trust Fund may enforce an employer's obligation to make contributions on behalf of an employee to the Trust Fund "through an action to collect delinquent contributions filed in the United States District Court in the Northern District of California." It further

provides that all employer contributions shall be due on the tenth (10th) day of the calendar month following the payroll month in which the employee has worked. Any contribution not received at the trust fund's designated lock box by the twentieth (20th) day of the calendar month following the payroll month in which the employee has worked, shall be considered delinquent.

This provision establishes that "contributions" as used in the Indentured Trust Agreement means the payments an employer is required to make in the calendar month following the month an employee has worked, that is, a "contribution" is a payment the employer is required to make because an employee worked the previous month. A "delinquent contribution" is a contribution that the employer fails to make by the 20th day of the calendar month following the month in which the employee worked. A claim for losses arising from an employer making improper contributions, that is, contributions that should not have been made, is therefore not a claim for "delinquent contributions" as that term is used in the Indentured Trust Agreement.

Notwithstanding the Indentured Trust Agreement's specific use of the term "delinquent contribution," the Trust Fund argues that there are two categories of "delinquent contributions." The first involves late payments for employees who worked. The second category "arises when the Trust Fund's auditor discovers that the employer has submitted contributions for an individual who is not eligible. In this situation, the Trust Fund administration office determines whether any claims have been paid to the Trust Fund as a consequence of the contributions

having been submitted. If it is determined that the claims have been paid and the amount of the claims paid has exceeded the amount of the improper contributions received, the Trustees treat that difference as an employer delinquency and bill that amount to the employer." Declaration of Charles Gilchrist Para. 6-7.

As support for its broad reading of "delinquent contribution," the Trust Fund cites Section 7.13(4) of the Indentured Trust Agreement. Section 7.13(4) provides:

[a]ll arbitration awards shall provide that the loser shall pay all costs, including arbitrator's fees. If the arbitrator rules that any contributions are delinquent or that the employer has not fully complied with all trust fund requirements, the employer shall be deemed the "loser" for purposes of this provision. (emphasis added).

The Trust Fund argues that this section demonstrates that the arbitration clause encompasses more than unpaid contributions, that it must include an employer's failure to comply with Trust Fund requirements, including the failure to make proper contributions.

This section, however, demonstrates that "delinquent contributions" is limited to claims for payments owed based on the number of hours eligible employees worked because it distinguishes between "delinquent contributions" and where "the employer has not fully complied with all trust fund requirements," by the use of the word "or" between these two clauses. Therefore, an employer not fully complying with all Trust Fund requirements does not necessarily involve a delinquent

contribution. The expedited arbitration provision, however, is limited to claims for delinquent contributions; it does not include other claims where the employer has not complied with all trust fund requirements. The fact that an employer is a "loser" for purposes of the arbitration if it failed to comply with Trust Fund requirements means that even if the arbitrator ultimately determines that no contributions are owed, the employer has to nonetheless pay the costs of arbitration if it otherwise failed to comply with Trust Fund requirements. This provision makes sense since that failure probably led to the Trust Fund's belief that contributions were owed. Nothing in section 7.13(d) suggests that delinquent contributions means anything more than "delinquent contributions" as used in the Indentured Trust Agreement.

The Trust Fund also claims its broad interpretation of "delinquent contributions" is consistent with the definition in Black's Law Dictionary. "Delinquent" when used as an adjective means "(1) (of a person) failing to perform an obligation; (2) (of a person) guilty of serious antisocial or criminal conduct; (3) (of an obligation) past due or unperformed." Black's Law Dictionary 439 (7th ed. 1999). In the arbitration clause, delinquent is used as an adjective to describe an obligation--contributions--not a person. Accordingly, only the third definition is applicable: past due or unperformed. Id. Thus, Black's Law Dictionary does not support the Trust Fund's argument that a "claim for delinquent contributions" includes a claim for reimbursement of benefits the Trust Fund paid to ineligible employees as a result of Able Maintenance making improper contributions on behalf of those employees.

The Trust Fund further emphasizes that it has proceeded to expedited arbitration on claims for reimbursement of payments made to ineligible employees on several occasions and in each case the Trust Fund prevailed. See Second Affidavit of Michael Johnson Par. 7. Johnson does not name names or give any specifics whatsoever, and there is no evidence that the Trust Fund has previously arbitrated a similar claim against Able Maintenance. Similarly, the fact that an Able Maintenance officer, Roy Molinari, was himself a Trustee does not, without more, establish that Able Maintenance agreed to expedited arbitration for claims for losses arising from improper contributions.

The Trust Fund's primary argument is that Able Maintenance is bound by the Trust Fund's interpretation of the arbitration agreement because the interpretation was made in good faith. Section 6.2(m) of the Indentured Trust Agreement authorizes the Trust Fund to "utilize discretionary authority in construing the provisions of [the Indentured Trust Agreement] and the terms used therein. Any construction adopted by the Trustees in good faith shall be binding upon the unions, the employers, and the beneficiaries." Indentured Trust Agreement Section § 6.2(m). This provision is consistent with trust law:

Trust principles make a deferential standard of review appropriate when a trustee exercises powers. (See Restatement (Second) of Trusts § 187 (1959) ("[w]here discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion"). (Citation omitted). A trustee may be given power to construe disputed or doubtful

terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable. (Citation omitted). Whether "the exercise of a power is permissive or mandatory depends upon the terms of the trust."

Firestone Tire & Rubber Company v. Burch, 489 U. S. 101,111 (1989). "The `abuse of discretion' standard applies where the [trustee] is given discretionary authority." Jones v. Laborers Health & Welfare Trust Fund, 906 F.2d 480, 481 (9th Cir. 1990).

Since the arbitration provision is part of the Indentured Trust Agreement, the Trust Fund arguably has discretionary authority to determine the meaning of "claims for delinquent contributions" in the context of the arbitration agreement. The question, then, is whether the Trust Fund abused its discretion in interpreting "a claim for delinquent contributions" as encompassing a claim for losses arising from an employer's improper contributions. See Trust Fund's Memorandum at 9-11 (arguing that Trust Fund's interpretation of expedited arbitration provision was not an abuse of discretion).

"[W]hen abuse of discretion is the standard, the court should not upset a plan administrator's construction of a term, even if the term is ambiguous, unless the construction conflicts with the plan's plain language." Pengilly v. Guardian Life Ins. Co. of Am., 81 F.Supp.2d 1010, 1020 (N.D. Cal. 2000) (citing Winters v. Costco Wholesale, Corp., 49 F.3d 550, 553 (9th Cir. 1995)). The Trust Fund's interpretation of "delinquent contributions" "conflicts with the [arbitration agreement's] plain language." See Pen ill , 81 F. Supp.2d

at 1020. The parties did not agree to an "all disputes" expedited arbitration procedure; instead, they agreed to expedited arbitration without the benefit of briefs or transcripts for a specific type of dispute, namely, a claim for delinquent, that is unpaid, contributions. A "contribution" in the context of the Indentured Trust Agreement is a payment made by an employer to the Trust Fund based on the number of hours worked by eligible employees. With respect to the benefits the Trust Fund paid on behalf of ineligible employees, the Trust Fund is not seeking delinquent contributions; rather, the Trust Fund is seeking reimbursement for the benefits the employer caused the Trust Fund to improperly pay. This type of dispute is not encompassed by the expedited arbitration agreement.

Accordingly, the Court finds "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." See Christiansen, 952 F.2d at 1076 (internal citation and quotation omitted). This Court therefore vacates the portion of the arbitration award that pertains to the claims for losses arising from improper contributions.

IV. Unpaid Contributions

The arbitration award included losses arising from improper contributions as well as an award for delinquent contributions. There is no dispute that "delinquent contribution," as used in the arbitration clause, includes unpaid contributions for eligible employees. Able Maintenance instead argues that the award with respect to delinquent contributions must also be vacated because the arbitrator should not have held the arbitration.

"[O]nce it is determined . . . that the parties are obligated to submit the subject matter of the dispute to arbitration, the procedural questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." John Wiley & Sons v. Livingston, 376 U.S. 543, 557 (1964).

The arbitrator continued the arbitration scheduled for November 2002 in order to give Able Maintenance time to initiate court proceedings. See Arbitration Award at 9. As of December 20, 2002, Able Maintenance had not filed a complaint, so the Trust Fund issued another notice of arbitration. The arbitration was scheduled for January 22, 2003.

On January 13, 2003 Able filed a complaint to enjoin the arbitration. The evening before the arbitration, Able Maintenance faxed the unnerved complaint to the Trust Fund with a letter stating that because Able had filed the lawsuit the arbitrator no longer had jurisdiction and the arbitration should be taken off calendar. The arbitrator did not receive Able's complaint or letter. The arbitrator subsequently held the arbitration on January 22, 2003 as scheduled without Able Maintenance in attendance.

Able Maintenance contends that it did not have a correct address for the arbitrator to provide her with notice of its complaint, and, in any event, the Trust Fund was aware that a complaint to enjoin the arbitration had been filed and that the arbitration should be cancelled.

It asserts that because the arbitration was held without its attendance, Able Maintenance was prejudiced and the arbitration award should be vacated.

Able Maintenance does not cite a single case that suggests that the filing of its lawsuit somehow deprived the arbitrator of authority to hold the arbitration with respect to unpaid contributions. Able Maintenance had proper notice of the arbitration and simply chose not to appear. Able did not even appear at the arbitration to give the arbitrator a copy of the federal court complaint or to provide a reason for postponement. Moreover, the arbitrator stated that she had previously provided Able Maintenance's counsel with her proper contact information. Arbitration Award at 8. Able had ample time to notify the arbitrator of its desire to postpone, and because it chose not to, the arbitrator was within her bounds to hold the arbitration ex parte. See Carpenters 46 Northern Calif. Conference Bd., 96 F.3d at 413 (stating that an arbitration "hearing is fundamentally fair if the minimal requirements of fairness-adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator-are met.").

Accordingly, the arbitration award, as it pertains to unpaid contributions for eligible employees, must be confirmed.

CONCLUSION

As there is no dispute that the parties agreed to arbitrate claims for unpaid contributions, the Trust Fund's motion to confirm the arbitration award with respect to unpaid contributions is GRANTED. The Trust Fund's motion to confirm the arbitration award

with respect to losses arising from improper contributions is DENIED on the ground that the expedited arbitration provision does not apply to such claims.

While Able Maintenance's motion to vacate the arbitration award was procedurally improper, since the filing of its "motion" both parties have had ample time to brief the issues. Given the Court's ruling, there would be no point in having Able Maintenance file a properly-noticed motion. Accordingly, Able Maintenance's petition to vacate the arbitration award with respect to losses arising from improper contributions is GRANTED and in all other respects is DENIED.

IT IS SO ORDERED.
Dated: May 6, 2004

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

Footnotes

Fn1The Trust Fund also complains that Able Maintenance filed an untimely memorandum in opposition to the Trust Fund's motion to confirm the arbitration award. The delay was minimal, amounting to only two hours and 48 minutes and is not a ground for ruling in the Trust Fund's favor.

Fn2Able Maintenance contends that the Trust Fund does not have a valid claim against it under ERISA and cites a case from the Second Circuit to support its contention. See Geller v. County Line Auto Sales, 86

F.3d 18 (2d Cir. 1996). Following the rule in Haig, regardless of whether the Court agrees with Able Maintenance, that is that under ERISA the Trust Fund does not have a claim against Able Maintenance for damages arising from improper contributions, the Court will not consider this argument. Haig, 30 F.2d at 499. The issue before the Court is the arbitrability of the dispute rather than the merits of the dispute.

Filed 5/9/2006
No. 04-16173
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ABLE BUILDING MAINTENANCE CO.,
Plaintiff-Appellee

v.

BOARD OF TRUSTEES OF GENERAL EMPLOYEES TRUST FUND,
Counter-claimant-Appellant;

BOARD OF TRUSTEES OF GENERAL EMPLOYEES TRUST FUND; et al.,
Defendants-Appellants

v.

ABLE BUILDING MAINTENANCE CO.,
Counter-defendant-Appellee,

and CHARLES GILCHRIST, an individual; et al.,
Defendants

ORDER

JUDGES: Before: REINHARDT, PAEZ, and TALLMAN, Circuit Judges.

The petition for rehearing is denied.

Pursuant to Federal Rules of Appeal Procedure 40, ABLE BUILDING MAINTENANCE COMPANY [hereinafter referred as Able], hereby petitions this court for panel rehearing of the Memorandum of Decision filed March 31, 2006:

I. REQUEST FOR ORDER ALLOWING FLING OF PETITION FOR REHEARING

Able respectfully requests this court issue an order allowing the filing of this Petition for Rehearing pursuant to the provisions of Federal Rules of Appellate Procedure 26(b) and Ninth Circuit General Order 6.3a an the following grounds:

The Memorandum of Decision in this case was filed on March 31, 2006. Counsel far Able first reviewed the Memorandum late in the week of April 3, 2006. When the Memorandum was initially reviewed, it was counsel's intent to take appropriate steps file a Petition for Rehearing. It was counsel's understanding and belief that the time for filing a Petition for Rehearing began to run upon service of the Judgment. counsel was under the good faith, yet mistaken, belief that a separate Judgment would be served by the court.

During the week of April 10, 2006, counsel was out of the office due to other matters, and then out of the office for the Easter holiday. Upon returning to the office on April 18, 2006, and upon re-reviewing the Memorandum, counsel discovered, for the first time, that the Memorandum also contained a Notice of Entry of Judgment, and that, pursuant to rule, the time to file a Petition for Rehearing would have expired on April 17, 2006.

Counsel far Able immediately commenced preparation of the instant request for late filing and the accompanying Petition for Rehearing, which is being filed only two (2) days after the deadline for filing.[1]

Able submits that this mistake is excusable pursuant to the principles set forth in Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership 507 U.S. 380 (1993).

As stated by the United States Supreme Court, in deciding whether to find excusable neglect, "the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, the danger of prejudice to the [opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith."

Id., at p. 395.

Here, the instant petition is being filed two (2) days after the deadline to file same. The delay in filing the petition was the result of counsel's mistake concerning whether the Memorandum constituted the judgment which commences the time for filing a Petition far Rehearing. This, coupled with counsel's absence from the office for the Easter holiday, resulted in the short delay.

There is no prejudice to the opposing party as a result of this delay, since the Petition has been filed so soon after discovering the mistake. Given the issues

involved, the party that suffers the most prejudice in denying the request to file the Petition far Rehearing is Able. Equitable principles dictate that this court accept the Petition for Rehearing on its' merits.

II. INTRODUCTION AND STATEMENT OF COUNSEL

On March 31, 2006, this Court issued a Memorandum of Derision in which it reversed, in part, the decision of the lower court an the grounds that Able waived any objection to the arbitrator's exercise of jurisdiction to determine arbitrability.

This issue was not an issue raised on appeal by way of briefing, nor did oral argument on appeal address this issue.

In counsel's judgment, the reversal of the lower court's ruling on a ground not raised on appeal in this matter overlooked the issues an appeal and reversed the lower court's ruling on grounds not submitted to this court. This prevented the parties to brief and argue this point on appeal.

Additionally, counsel in good faith believes that the decision in this matter conflicts with other decisions of this court an the issue of waiver of the right to contest arbitrability, and since it was not an issue on appeal, the parties should have the opportunity to fully brief this issue before a final decision is rendered.

III. STATEMENT OF RELEVANT FACTS ON PETITION FOR REHEARING

This is an appeal from a ruling by the United States District Court which vacated that portion of an arbitration award that found in favor of appellant, Board of Trustees of General Employees Trust Fund [hereinafter, "GETF"], on its' claim for improper contributions under a Trust Indenture. Appellant's Opening Brief sets forth the issues on appeal as follows:

"1. Did the district court err by interpreting the arbitration cause to exclude the Trust Fund's claims to recover monies expending covering ineligible individuals an whose behalf the Employer improperly made contributions?

2. Did the district court err by ordering the Trust Fund to bear its own casts and attorney's fees?'

Appellant's Opening Brief, page 4.

All of the briefing and argument in this matter centered on those issues. Put simply, the issue on this appeal was whether the district court properly vacated that portion of the arbitration award that awarded GETF damages for improper, as opposed to delinquent contributions. Absent from this appeal were issues of whether Able had waived its right to contest arbitrability and this issue was neither briefed nor argued by either party to this appeal.

The Memorandum of Decision, filed by this Court on March 31, 2006, reversed, in part, the decision of the district court on the grounds that Able had waived any objection to the arbitrator's jurisdiction over this matter. Memorandum, pp. 2 - 3. The district court opinion, which was the subject of the appeal in this

matter had addressed that issue and disposed of it in favor of Able. Appellant's Excerpt of Record pp. 209-210.

IV. THIS PETITION FOR REHEARING IS PROPER TO ALLOW THE PARTIES TO ADDRESS THE ISSUE ASSERTED BY THE COURT IN REVERSING THE DISTRICT COURT'S ORDER

Federal Rule of Appellate Procedure Section 40 allows a party to request rehearing and re-submission of a matter when it believes that the "Court has overlooked or misapprehended" a point of fact or law. FRAP 40(a)(2). In this instance, Able submits that rehearing pursuant to FRAP 41 is proper in that the decision of this court as premised on issues that were neither raised in the briefing of this case, nor during oral argument. Therefore, the parties have not been provided the opportunity to brief the issue upon which the court ultimately decided.

Additionally, there are other decisions rendered by this Court that conflict with the authority cited by this Court in its Memorandum, and the parties should, at a minimum, be given the opportunity to fully brief this issue.

V. ABLE DID NOT WAIVE IT'S RIGHT TO CONTEST THE JURISDICTION OF THE ARBITRATOR ON THE ISSUE OF ARBITRABILITY OF CLAIMS FOR IMPROPER CONTRIBUTIONS

The district court specifically addressed the issue of jurisdiction of the arbitrator to determine arbitrability. In disposing of this issue, the district court reasoned:

"The Trust Fund argues that Able Maintenance impliedly consented to the arbitrator deciding arbitrability because it defaulted under Section 7.13(a) of the Indentured Trust Agreement. The default provision empowers the arbitrator to enter a default award against an employer who fails to appear at an arbitration without good cause. Indentured Trust Agreement §7.13(a). This default provision does not transform Able Maintenance's nonparticipation in the arbitration into consent to have the arbitrator determine arbitrability. The Trust Fund does not cite any case an which a district court was stripped of jurisdiction to determine arbitrability because the opposing party did not appear at the arbitration and instead filed a lawsuit. This omission is unsurprising given in that Carpenters 46 Northern California Counties Conference Board 96 F.3d at 415-16, the Ninth Circuit held that an employer's refusal to participate in an arbitration is 'clearly insufficient to establish assent to arbitration by conduct.' see also id. at n.4 (stating that under Gorge Day the only inquiry is whether the employer's actions 'clearly evinced' its consent to have the arbitrator resale the arbitrability issue and that a 'refusal to participate in the arbitration hearing, far whatever reason, cannot be said to manifest such consent.') Unlike George Day there is no evidence that Able impliedly consented to the arbitrator deciding arbitrability; to the contrary, it filed a lawsuit challenging the arbitrator's jurisdiction to decide the dispute. Because Able Maintenance did not consent to

the arbitrator deciding arbitrability, the Court must decide the issue."

Appellant's Excerpt of Record pp. 209 - 210.

Able submits that by objecting to the arbitration on arbitrability grounds and not subjecting itself to a decision on the merits of the dispute, it has preserved, not waived its' right to contest arbitrability. In George Day Construction Co. v. United Brotherhood of Carpenters and Joiners 722 F. 2d 1471, 1475 (9th Cir. 1984), this Court held that the employer, who had objected to arbitrability, yet proceeded to attend the hearing and contest the matter an its' merits, had impliedly consented allow the arbitrator to determine the issue of arbitrability, therefore the arbitrator's decision an that issue was given deference.

Here; it is probably that had Able appeared for the arbitration hearing and objected to it proceeding based on its' position that the arbitrator had no authority to consider the issue of improper contributions, that GETF would be invoking George Day Construction for the argument that Able had consented to allow the arbitrator to determine arbitrability. As stated in George Day

"An employer who objects to arbitration on jurisdictional grounds may refuse to arbitrate the case. The union is then put to the task of petitioning the court to compel arbitration...In such cases, the question of substantive arbitrability comes before the court in the first instance."

Id at p. 1475.

The ruling in George Day has been used consistently on this issue. In Ca enters 46 N. Ca. Cos. Conf v. Zcon Builders 96 F.3d 410, 415-416 (9th Cir. 1996) [cited by the district court in this case], this Court declared:

"The George-Day decision instructs us to look for conduct which 'evidenced clearly' Keating's intent to allow the arbitrator to decide the arbitrability issue. We find none ...Keating advised the arbitrator that Sharon Hill was not at the hearing to present evidence on the arbitrability issue, and that the issue 'should not be determined right now.' This is a far cry from the position taken by the employer in George Day and is clearly insufficient to establish assent to arbitration by conduct."

The propriety of not appearing at an arbitration hearing in order to preserve the issue of arbitrability has been confirmed by this Court in Pacesetter Const. v. Carpenters 46 N.Ca., 116 F.3 d 436, 44a (9th Cir. 1997).

Therefore, the instant decision, notwithstanding the fact that it was not identified as an issue on appeal, is at odds with this Court's own rulings on this issue. Further briefing and argument on the issue of waiver is therefore warranted.

The district court's ruling set forth with particularity the facts which evidenced Able's objection to arbitration, and, hence, arbitrability on the issue of improper contributions. Able did not merely fail to appear at the arbitration; it filed a Complaint contesting the arbitrator's jurisdiction to award damages far improper contributions before the

arbitration hearing and notified GETF of the complaint prior to the hearing. It also attempted to notify the arbitrator but did not have any contact information far the arbitrator.

VI. CONCLUSION

Able respectfully requests this Court to consider this Petition far Rehearing on it's merits, in that good cause exists to allow this Petition to be filed..

Able further submits that a Petition for Rehearing is proper in that (1) the decision of this Court rests on issues which were not identified as issues on appeal and therefore neither briefed nor argued to the Court; and (2) the decision at issue is in conflict with other decisions of this Court.

Dated: April 19, 2006

Footnote

fn1See Affidavit of Kerri A. Johnson, filed concurrently herewith.

AFFIDAVIT OF KERRI A. JOHNSON IN SUPPORT OF PETITION FOR REHEARING
STATE OF CALIFORNIA. COUNTY OF SANTA CLARA

I, Kerri A. Johnson, being first duly sworn, deposes and says:

1. I am an attorney duly licensed to practice law in the State of California and in Ninth Circuit Court of Appeals. I am a member of the law firm of Simoncini & Associates, counsel of record for Able Building Maintenance Co. I am fully familiar with all of the pleadings and proceedings in this matter.

2. I submit this Affidavit in Support of Able Building Maintenance's Petition for Rehearing, and in support of Able's request to have the Petition for Rehearing heard on the merits pursuant to Federal Rules of Appellate Procedure 26(b).

3. The Memorandum of Decision in this case was filed on March 31, 2006. I first reviewed the Memorandum late in the week of April 3, 2006. When I first reviewed the Memorandum,, it was my intent to take appropriate steps file a Petition for Rehearing. It was my understanding and belief that the time for filing a Petition for Rehearing began to run upon service of the Judgment. I was under the good faith, yet mistaken, belief that a separate Judgment would be served by the

court.

4. During the week of April 10, 2006, I was out of the office due to other matters, and then out of the office for the Easter holiday. Upon my return to the office on April 18, 2006, and upon re-reviewing the Memorandum, I discovered, for the first time, that the

Memorandum also contained a Notice of Entry of Judgment, and that, pursuant to rule, the time to file a Petition for Rehearing would have expired on April 17, 2006.

5. I immediately commenced preparation of the instant request for late filing and the accompanying Petition for Rehearing, which is. being filed two (2) days after the deadline for filing.

6. It is my good faith belief that given the circumstances, as well as the fact that this Petition is sought to be filed only two (2) days late, that the mistake in calculating the time to file a Petition for Rehearing is excusable and that appellant in this matter will not be prejudiced by the court hearing this petition on its' merits. I therefore respectfully request this Court to allow the late filing of the Petition for Rehearing and consider said Petition on its' merits.

I signed this affidavit on April 19,,;006 at San Jose, California.

Kerri A. Johnson

SUBSCRIBED AND SWORN before me on April 19, 2006 at San Jose, California. ROTARY PUBLIC

LOOSE CERTIFICATE ATTACHED

(notary's signature, date of commission expiration)